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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-6740 ORIGINAL COPY

ROBERT BULLINGTON, Petitioner

vs.

STATE OF MISSOURI, Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT BULLINGTON, Petitioner	)	
vs.	)	No. 79-6740
STATE OF MISSOURI, Respondent	)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSOURI

TO: THE HONORABLE, THE CHIEF JUSTICE and
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES

The State of Missouri respondent herein, by George A. Westfall, Prosecuting Attorney and James J. Cook, Assistant Prosecuting Attorney hereby responds to the petition for Writ of Certiorari filed in this cause.

QUESTIONS PRESENTED FOR REVIEW

Respondent wishes to inform the Court that as to Petitioner's statement concerning what evidence will be presented at a second trial (p.2,A(c) of the petition), the State has indicated to the Missouri Supreme Court that it anticipates that the evidence to be presented will be substantially the same as at the first trial. The State does not know if it will be identical.

ARGUMENT

Double Jeopardy.

Petitioner's argument that a second trial in this case violates his Constitutional rights against double jeopardy is without merit. Petitioner assumes as true an interpretation of the law that has never been given judicial support. In North Carolina v. Pearce, 395 U.S. 711 this Court stated that the Double Jeopardy Clause

> protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple prosecutions for the same offense. Id at 717.

Petitioner states throughout his argument that he should not be subject to a retrial when in fact that is what he requested. It is well established that a person can be retried for the same offense after his motion for new trial is sustained. U.S. v. Ball, 163 U.S. 662, 672, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). Here however petitioner claims he has been acquitted of an offense and cannot be retried for that offense. This argument is not supported by the law.

All of the cases cited by petitioner deal with defendants who were trying to avoid the entire retrial of their case. In the instant case we are dealing only with the sentence to be available to the jury for imposing upon the defendant at his subsequent trial.

To avoid this problem petitioner invents a new offense, capital murder - death penalty, and declares that he has been acquitted of that offense.

But just in case the Court does not accept that fiction, petitioner also alleges that collateral estoppel bars the State from seeking the death penalty here. An examination of the instructions given the jury in the first trial (Exhibit C of Petitioner's Appendix) will disclose the fallacy of that argument. It is true that the jury must find beyond a reasonable doubt that an "aggravating circumstance" exists before it can return with a death penalty. However, the instructions are set up in such a way that a decision of life imprisonment does not mean that no aggravating circumstance was proven beyond a reasonable doubt. The jury may have found that such an aggravating circumstance did exist but for other reasons they choose not to impose the death penalty. The instructions allow this result.

Death - Qualified Jury.

Petitioner's logic here would require that this Court review every death penalty case before a jury was even picked. In every criminal case there are constitutional rights which are afforded the defendant. Everytime a trial judge rules against a defendant on any motion which involves a constitutional issue, the potential for error exists. Recent history has shown that where the death penalty is involved, a wide variety of constitutional questions may be raised. If petitioner is granted his writ because of this argument, every defendant in a capital case aggrieved by a trial judge ruling on a constitutional issue would be entitled to review by this Court before being tried. This is not judicial efficiency, but a break down in the orderly procedure of judicial review and appeal, which has been developed over many years of experience.

Question will again be before the court.

The State does not dispute the statement that the issue here is of great importance. However to assert, as petitioner does, that if this Court does not hear his plea now he will just have to bring it back later seems an unwarranted threat.

The State would suggest that the position held by petitioner will be as devoid of merit later as it is now. Just because an issue is important does not mean the Court must hear it. Some issues, as the one in question here, are basically without dispute except for petitioner's desires. This Court has already decided that a greater sentence upon retrial is constitutional. (Chaffin v. Stynchombe, 412 U.S. 17 (1973)). In Chaffin, this Court reaffirmed the decision in Stroud v. U.S., 251 U.S. 15 (1919) which specifically dealt with the death penalty.

As will be seen below, there is not the great conflict between the States over this issue that petitioner would have us believe.

Therefore, although the issue is important, there is no real reason for this Court to reexamine it at this time. The threat of petitioner that the issue will be brought late surely can have no effect.

The Cox case cited by petitioner as authority for this part of his argument does not require that this petition be accepted by the Court at this time. (Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 483 (1978)). It merely restates the principal that in many instances this Court will speak on important issues in a case which is already before it, even if those issues are not required to be addressed in order to reach a decision on the merits. It is a much larger step to grant this petition merely because some of the issues involved might come before the Court in the future.

Final Judgment Below.

The State does not dispute that the decision of the Missouri Supreme Court in State ex rel. Westfall v. Mason is a final judgment.

Conflict Between the States.

It is ture that if there is substantial conflict between the highest courts of various states, and particularly if these state decisions conflict with rulings of this Court, that certiorari may be granted to resolve the issue. However the State of Missouri suggests that the conflict here is very minor if it exists at all.

The leading case in California is People v. Henderson, 386 P.2d 677 (1963). This case was decided before Chaffin v. Stynchombe, 412 U.S. 17 (1973). The People v. Payne case cited by petitioner (142 Cal Rpt 320) does not apply because there the Court reached its decision because of a change in the capital murder law between the date of the offense and the second trial. People v. Johnson, 113 Cal. Rpt 303, was decided after Chaffin but seems to ignore it.

Additionally a close reading of Henderson will disclose that

the California court expresses concern over the conflict in the cases; a conflict which was resolved by Chaffin. The California court even decided that the Stroud decision was no longer good law. This Court specifically refused to overrule Stroud in Pearce.

Georgia decided this issue on specific non-constitutional grounds. In Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977) the Georgia Supreme Court decided that the death penalty would be automatically precluded in a retrial where life was the sentence at the first trial. This was based upon the statutory requirement that the state supreme court examine death sentences and set aside those which are disproportionate to sentences in other similar cases. Beside being non-constitutional, this decision is also illogical. Who is to say that the jury giving life was not aberrant. To automatically conclude that the jury giving life at the first trial was correct and all later juries must conform or be considere aberrant is just not logical. Be that as it may, this is not even considered a constitutional question according to the Georgia Supreme Court and therefore the Georgia case should not be considered here.

The Pennsylvania case cited, Commonwealth v. Littlejohn, 433 Pa. 336, 250 A.2d 811 (1969) also was decided before Chaffin. In fact a more recent Pennsylvania case should be noted. Commonwealth v. Klobuchir, 405 A.2d 881 (1979) says this:

> We also note that although Commonwealth v. Littlejohn was decided in 1969, it did not have the benefit of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), because Pearce was decided several months later. Because Pearce made it clear that neither due process, equal protection, nor double jeopardy pose absolute bars to increased punishment upon reconviction, the continuous vitality of Littlejohn as an interpretation of federal constitutional law is open to question. Id at n.15 p.888.

In Florida, the case cited (Robertson v. State, 258 So.2d 257 (1971))

was also decided before Chaffin. The Florida court read Pearce without the benefit of Chaffin.

In reality therefore there is not the great conflict that petitioner suggests. Only in California and Georgia would the decision be different from that in Missouri and those decisions are not enough to require this Court to act at this time.

A close examination of the cases cited by petitioner shows that the states do not disagree as to how to apply identical constitutional issues. Only California disagrees with Missouri in a post-Chaffin decision. This is surely not reason enough for this Court to step in.

Emotional Torment.

Petitioner's argument here is basically a restatement of his Witherspoon argument. However a few statements should be made.

Petitioner states that if the death penalty is allowed he will face great expense and substantial effort at the punishment phase of the trial. Petitioner presented no evidence whatsoever at his first trial punishment phase.

Counsel's concern over trial strategy should certainly not be considered a reason to grant certiorari. If all potential constitutional questions could be decided by the Court prior to trial, we could all have our tasks simplified. However this argument absolutely revises our judicial system.

Petitioner's real point in this entire effort is the "separate offenses theory"; his own invention. Nowhere in the law of this land can he find support for his proposition that he has been acquitted of something.

The jury in petitioner's first case was not required to find anything to sentence him to life. They were not required to find

the absence of anything either. To elevate the sentencing phase of the bifurcated trial to the leval petitioner seeks goes far beyond any decision previously handed down by this or any other Court.

One of the other arguments to disallow seeking the death penalty is that it would be disproportionate to the life sentence given at the first trial. Although it is true that the State has indicated to the Missouri Supreme Court that it anticipates that the evidence will be substantially the same at the second trial, it is entirely inappropriate to base a ruling upon that assertion. No one knows exactly how the evidence will come out at trial. And although the State has no indication that such would be the case, it is always possible that new evidence would develop right up until the trial date itself. Therefore to automatically declare that a death penalty at a second trial is disproportionate is premature and illogical.

Petitioner also discusses his allegation that the aggravating circumstances alleged are vague and therefore unconstitutional. Petitioner then condenses over seven days of testimony into two sentences and asks this Court to determine that this case falls into the rule promulgated by Godfrey v. Georgia, No. 78-6899. Surely the proper time for such a decision is upon appeal when the Court can view a transcript and learn all of the evidence.

Petitioner also addresses the "chilling effect argument." This was put to rest in Chaffin:

> ...The choice occasioned by the possibility of a harsh sentence even in the case in which the choice may in fact be difficult; does not place an impermissable burden on the right of a defendant to appeal or attack collaterally his conviction. 412 U.S. 35.

CONCLUSION

Petitioner raises several issues here which when read in the

light of the established law of this land are without merit. For the reasons set forth above it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

George R. Westfall

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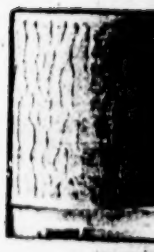

79-6740

SUPREME COURT OF THE UNITED STATES

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ROBERT BULLINGTON,

Petitioner

vs.

STATE OF MISSOURI

Petitioner, Robert Bullington, who is now held in the St. Louis County Jail, at Clayton, Missouri, asks leave to file the attached petition for writ of certiorari to the Supreme Court of the State of Missouri without prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this petition is attached hereto.

Richard H. Sindel, #23406
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AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

ROBERT BULLINGTON,

Petitioner

vs.

STATE OF MISSOURI

I, Robert Bullington, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. Because of my poverty I am unable to pay the costs of said cause.

2. I am unable to give security for the same.

3. I believe that I am entitled to the redress I seek in said cause.

4. The nature of said cause is briefly stated as follows:

I was found guilty of Capital Murder. After hearing evidence of aggravating circumstances which would have enabled the jury to return a verdict of death under the applicable law, the jury decided that I should be sentenced to life imprisonment in the State of Missouri, Division of Corrections, and I was so sentenced. My timely motion for a new trial was sustained by the trial court. The State filed notice that upon retrial the State would produce identical evidence of aggravation and again seek the death penalty. I filed a motion to strike the State's evidence of aggravation, and the trial court announced its intention to sustain my motion. The State sought and received a writ of prohibition against the trial court. The Supreme Court of Missouri ordered the writ be made absolute on March 11, 1980, upon denying my request for a rehearing thereby permitting the State to again seek the death penalty on retrial. My petition filed herewith seeks a review of that judgment.

Robert E. Bullington
ROBERT BULLINGTON

this 4 day of June, 1980.

Linda S. Soell
Notary Public

LINDA S. SOELL
MY COMMISSION EXPIRES APRIL 10, 1982